U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: March 12, 1998

CASE NO. 96-INA-86

In the Matter of:

CARMI & KNOLL, D.D.S.,
Employer,

on behalf of

BOGDAN SIMIONESCU,
Alien.

Before: Burke, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

This case involves an application for certification (ETA 750A) to permit the permanent employment of the Alien as a Dental Technician to perform the following duties:

> Will cast models, make temporary crowns and bridges, will set teeth, make removable dentures and repair defective dentures. Will use hand and power tools.
>
> Will fabricate full or partial dentures, using wax, plastic and plaster models,

> articulators, grinders, and polishers. Will select and mount replacement teeth in model to match color scales and tooth illustrations, will also remove excess plastic and polish surfaces of cast dentures, using grinding and polishing tools and ultrasonic equipment.

The Employer specified, in substance, that any U.S. applicant for the position was required to have 4 years experience in the job offered or 4 years of school or job training as a Dentist or as a Dental Technician.

The District of Columbia Department of Employment Services (D.E.S.), the agency responsible for the initial processing of the ETA 750A, classified the position as a Dental Laboratory Technician, *Dictionary of Occupational Titles* (D.O.T.) Code 712.381-018.

Upon the receipt of the case from the D.E.S., the CO issued a Notice of Findings ("NOF") in which he proposed to deny certification for the following reason:

> UNDULY RESTRICTIVE JOB REQUIREMENTS. Federal regulations at 20 CFR 656.21(b)(2) state that the employer is required to document that the requirements of the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States.
>
> Your requirements for the position of Dental Laboratory Technician are 4 years of experience in the job offered or 4 years of school or job training as a dentist or as a dental technician. These requirements are determined to be unduly restrictive because 4 years of school or job training as a dentist are not normally required to perform the job duties as a dental technician.
>
> According to the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, most dental laboratory technicians learn their crafts on the job. Training in dental laboratory technology is also available through community and junior colleges, vocational-training institutes, and the Armed Forces. Training programs accredited by the Commission on Dental Accreditation in conjunction with the American Dental Association generally take 2 years to complete and lead to an Associate degree.
>
> It appears that the requirement of 4 years of school or job training as a dentist is solely to accommodate the training and experience of the alien and do not represent the normal requirements of this position. In addition, the requirement may have a chilling effect on U.S. applicants reading the advertisement. A fully qualified U.S. Dental Laboratory Technician could read the advertisement and assume professional dental responsibilities (requiring a license) are involved due to the requirement of schooling and/or training as a dentist.

The Employer was informed that the finding may be rebutted by submitting evidence that the requirement arises from a business necessity which must include documentation that schooling and/or training as a dentist is necessary to perform the duties as a dental technician. They were instructed to include in such documentation signed statements from at least 3 other dentists that they require their dental technicians to have 4 years of schooling or training as a dentist to perform the duties of a dental technician. They were advised also that they could eliminate the requirements and readvertise the position.[1]

The Employer responded to the NOF by noting, in substance, that training as a dentist was only an alternative method of qualifying for the position and that any candidate who had 4 years of dental technician training or experience, or a combination thereof, would be considered qualified. Submitted with the rebuttal were statements from three dentists to the combined effect that it has been their practice to hire dental technicians with at least 4 years or training and/or experience.

The CO issued a Final Determination in which he denied the application for certification for the following reason:

> The issue identified in the NOF was that 4 years of training as a dentist is not normally required to perform the duties of a dental technician. The fact that you are accepting 4 years of experience in the job offered, 4 years of training as a dental technician or 4 years of training as a dentist does not change the fact that 4 years of training as a dentist is not a normal requirement for the job of dental technician. Your argument that the requirement does not reduce the pool of available [applicants] does not address the finding that this is not a normal requirement for this type of position.

The Employer has requested a review of the denial of certification and the record has been submitted to the Board for such purpose.

DISCUSSION

Relying on *Best Luggage*, 88-INA-553 (Nov. 1, 1988), Employer stated that the Board

---

[1] The CO also informed Employer that "[i]f you choose to document business necessity, you may not also indicate a willingness to delete or amend the requirement(s) in the event that your business necessity rebuttal is not accepted." (AF 20). This is an erroneous instruction. A CO may not, by fiat, prohibit an employer from making an unequivocal offer to re-advertise if its attempt at establishing business necessity for a job requirement fails. This is an appropriate means of rebuttal. *Ronald J. O'Mara*, 96-INA-113 (Dec. 11, 1997) (*en banc*) (affirming the doctrine of *A. Smile*, 89-INA-001 (March 6, 1990)).

has held that an employer's experience requirements are not unduly restrictive where they are listed in the alternative and are both related to and appropriate for the job opportunity. However, since this matter came to the Board, *Best Luggage* has been overruled in *Francis Kellogg, et al.*, 94-INA-465 and 544, 94-INA-068 (Feb. 2, 1998) (*en banc*), wherein the full Board squarely addressed the issue presented herein, that is, how to analyze job requirements where an employer lists alternatives. In *Kellogg*, the Board held that

> any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the D.O.T., and shall not include requirements for a language other than English (20 C.F.R. §656.21(b)(2)).

Slip op. at 6. The Board also held that where the alien does not meet the primary job requirements, but only potentially qualifies based upon the alternative job requirements, those requirements are to be deemed unlawfully tailored to the alien's qualifications unless the employer has indicated a willingness to accept applicants with any suitable combination of education, training and experience. *Slip op.* at 6-7.

The Board in *Kellogg* also acknowledged that there may be instances where a job offer contains legitimate alternative job requirements, "which can, and should be permitted in the labor certification process."

> For example, where an employer's primary requirement is considered normal for the job in the United States, and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a §656.21(b)(2) analysis.

Id.

In this matter, the CO denied the application because he found that the alternative job requirement of four years of schooling or training as a dentist is not normally required for the job in the United States. This reasoning is flawed according to *Kellogg*. Employer's requirements of four years experience in the job offered or four years experience in school or job training as a dental technician are normal for the job in the United States. Moreover, Employer presented independent documentation to establish that, as an alternative, an applicant with four years of schooling or training as a dentist could perform in a reasonable manner the duties of the job

offered.[2] In applications like the one at bench, the inquiry should not be focused on whether an employer in the United States would normally require an applicant to have this alternative experience; rather, it is whether an applicant with the alternative experience could perform in a reasonable manner the duties of the job offered such that an employer in the United States would normally accept such an applicant, if that applicant came knocking on employer's door ready to accept the job offered at the wage offered, and whether the employer concerned is willing to accept any applicants who have other suitable combinations of education, training or experience. Here, an applicant with the alternate requirements would clearly be so accepted, and the CO has not identified any other such suitable combinations, nor are we aware of any.[3] Accordingly, we find that labor certification was not properly denied, and the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for the Certifying Officer to **GRANT** labor certification.

For the panel:

_____

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400

---

[2] Both the primary and the alternative requirements herein fall within the Dictionary of Occupational Titles ("DOT") specific vocational preparation ("SVP") for Dental Laboratory Technician of SVP-7, which is over 2 years and up to and including 4 years of experience and training. *See* D.O.T. Code 712.318-018.

[3] We disagree with the CO that including "4 years school training as a dentist" in the advertisement, which also included "4 years experience in the job or 4 years school training as a . . . dental technician", would have a negative effect on potential U.S. dental technician applicants. The job advertisement was listed under the heading "Dental Technician".

Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.